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In the

Supreme Court of the United States

October Term, 1999

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, LUMMI NATION, PUEBLO OF SAN FELIPE, TOHONO O'ODHAM NATION, AND ZUNI INDIAN TRIBE SUPPORTING THE UNITED STATES' PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES:

Arizona v. California
460 U.S. 605 (1983) 3

Arizona v. San Carlos Apache Tribe of Arizona
463 U.S. 545 (1983) 3

City of Albuquerque v. Browner
97 F.3d 415 (10th Cir.), *cert. denied*, 522 U.S. 965 (1997) 2

Colorado River Water Conservation Dist. v. United States
424 U.S. 800 (1976) 3

Klamath Water Users Protective Ass'n v. U.S. Dept. of Interior
189 F.3d 1034 (9th Cir.) 1

Nevada v. United States
463 U.S. 110 (1983) 3, 4, 4n, 6

United States v. Adair
723 F.2d 1394 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984) 4

United States v. Winans
198 U.S. 371 (1905) 2

Winters v. United States
207 U.S. 564 (1908) 4

FEDERAL STATUTES AND REGULATIONS:

25 U.S.C.A. § 175 (1983) 3, 5

25 U.S.C.A. § 450a(b) (Supp. 2000) 2

33 U.S.C.A. § 1377 (Supp. 2000) 2

42 U.S.C.A. § 300j-11 (Supp. 2000) 2

43 U.S.C.A. § 666 (1986) 3

TRIBAL CODES:

Law and Order Code of the Shoshone and Arapahoe Tribes of the Wind River Reservation, Wind River Water Code, § 11-8-I(A)(1) 1n

OTHER AUTHORITIES:

F. Cohen, *Handbook of Federal Indian Law* 221 (1982 ed.) 6

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Pursuant to Rule 37 of the Rules of the United States Supreme Court, the Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, Lummi Nation of Washington, Pueblo of San Felipe of New Mexico, Tohono O'odham Nation of Arizona, and Zuni Indian Tribe of New Mexico and Arizona respectfully file this brief as *amici curiae* in support of the United States' Petition for a Writ of Certiorari, seeking review of the divided decision of the United States Court of Appeals for the Ninth Circuit entered on August 31, 1999, and reported at 189 F.3d 1034. Both Petitioner United States and Respondent Klamath Water Users Protection Association have granted their consent to the filing of this *amici curiae* brief. The parties' written consents previously have been placed on file with the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

The Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, Lummi Nation of Washington, Pueblo of San Felipe of New Mexico, Tohono O'odham Nation of Arizona, and Zuni Indian Tribe of New Mexico and Arizona (collectively "*Amici Curiae*" or "Tribes") are five federally-recognized Indian tribes that possess extensive natural resource holdings, including water rights, held in trust for them by the United States. It is no exaggeration to say that the Tribes' natural resource holdings are among their greatest assets.[1] To ensure that those assets are properly protected, each of the Tribes traditionally has engaged in regular consultations with the federal government, particularly with personnel of the Bureau of Indian Affairs ("BIA"), concerning the protection and management of their trust resources. These consultations are a natural

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[1]This crucial importance arises generally because most Indian tribes lack the tax base and other sources of revenue typical of state and local governments. In the absence of other revenue streams, the importance of a tribe's natural resource holdings as a means of raising revenue is magnified. Of perhaps even greater and more fundamental importance, however, is the role that tribal land and water resources play in the cultural and spiritual life of a tribe. *See, e.g.*, Law and Order Code of the Shoshone and Arapahoe Tribes of the Wind River Reservation, Wind River Water Code, § 11-8-1(A)(1) ("The Tribes find that all Reservation natural resources are interconnected; and that the water resource has cultural, spiritual and economic values that guide the appropriate use, management and protection of that resource and that condition all water and land use activities in the watersheds and drainage basins of the Reservation.").

outgrowth of the federal government's trust responsibility to the Tribes: because the Tribes possess much of the information the federal government needs to protect and manage the Tribes' natural resources, the federal government consults with the Tribes to obtain this information. The federal government's fulfillment of its trust duty as it concerns the Tribes' natural resource holdings largely depends upon the regular exchange of views and information between itself and the Tribes. Indeed, current federal Indian policy mandates greater tribal control over tribal trust resources, subject only to overriding federal supervisory authority. *See* 25 U.S.C.A. § 450a(b) (Supp. 2000) (Indian Self-Determination and Education Assistance Act). Nowhere is the imprint of this policy more apparent than in the management of water resources. *See* 33 U.S.C.A. § 1377 (Supp. 2000) (Clean Water Act); 42 U.S.C.A. § 300j-11 (Supp. 2000) (Safe Drinking Water Act). *See also City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir.), *cert. denied*, 522 U.S. 965 (1997) (by "amend[ing] the Clean Water Act to authorize the . . . EPA to treat Indian tribes as states under certain circumstances for purposes of the Clean Water Act[,] . . . Congress merged two of the four critical elements necessary for tribal sovereignty – water rights and government jurisdiction – by granting tribes jurisdiction to regulate their water resources in the same manner as states").

Amici Curiae are deeply troubled that the practical result of the Ninth Circuit's decision will be to stifle, if not end, the open and candid exchange of views and information between Indian tribes and the federal government that is vital to the government's proper exercise of its trust responsibility to protect tribal trust resources. Knowing that the information they submit to the BIA now will be available under the Freedom of Information Act ("FOIA") to their adversaries, the Tribes already have ceased providing proprietary information about their land and water resources to the federal government, even in the context of active litigation. In light of the vital role that the exchange of information between Indian tribes and the federal government plays in the protection and management of tribal trust resources, the Tribes fear that the decision below will leave the federal government unable to fulfill properly its role as trustee and ultimately result in the evisceration of the trust responsibility. Such a result will be devastating to Indian tribes, which in large part have no choice but to rely on the federal government to protect their trust resources, especially their water rights.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that the rights possessed by Indian tribes to natural resources, and in particular their rights to water, "[are] not much less necessary to the existence of the Indians than the atmosphere they breathe[ ]." *United States v. Winans*, 198 U.S. 371, 381 (1905). Pursuant to its trust responsibility to manage and protect the property of

Indian tribes, it falls largely to the federal government to assert tribal water rights claims. 25 U.S.C.A. § 175 (1983). Water rights claims for tribes must encompass both present and future needs, since water adjudications determine rights for all time pursuant to the doctrine of finality. *Arizona v. California*, 460 U.S. 605, 618-619 (1983). This mandate is enormously challenging. The ability of the federal government to fulfill its solemn trust duty in this area historically has depended upon the maintenance of a close and confidential working relationship with the Indian tribes, whose intimate knowledge of their land and water resources is indispensable to the federal government's advancement of their claims. Confidentiality and cooperation have always been the hallmarks of this trustee-beneficiary relationship. The decision of the court of appeals in this case, however, interprets the FOIA to mandate the disclosure of information exchanged in furtherance of this relationship, thereby removing the element of confidentiality. When confidentiality is stripped from the trust equation, the federal government's ability to assert tribal water rights claims is threatened, and the very foundation of the trust responsibility itself is cast into doubt.

Previous decisions of this Court construing the McCarran Amendment, 43 U.S.C.A. § 666 (1986), direct that the adjudication of the existence and quantity of federal reserved water rights for Indian tribes, in addition to other federal reserved water rights, take place in the course of general stream adjudications. *See, e.g., Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566 n.17 (1983) (". . . although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings.") (emphasis in original); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). As the Court also has made abundantly clear, a judgment entered against the United States regarding the adjudication of Indian reserved water rights is binding against an Indian tribe whose rights are adjudicated and quantified. *Nevada v. United States*, 463 U.S. 110, 135 (1983); *San Carlos Apache Tribe of Arizona*, 463 U.S. at 566 n.17. Although an Indian tribe may seek leave to intervene in the state proceedings to protect its own interests, primary responsibility for the litigation of Indian reserved water rights claims lies with the United States. Regardless of whether it decides to participate directly in a judicial proceeding in which its water rights will be quantified, an Indian tribe will be bound by the decision of the state tribunal establishing the existence and quantity of the right.

The relationship between an Indian tribe and the federal government arising out of the McCarran Amendment's mandate that the United States assert Indian reserved water rights claims in general stream adjudications is that of allies aligned in the pursuit of an identical interest, for the simple reason that the Indian tribe will be bound by the decision

reached in the proceeding in which the federal government represents its interests. It follows that an Indian tribe must do everything in its power to ensure that the federal government pursues a claim for that amount of water to which the tribe believes it is entitled for all time pursuant to *Winters v. United States*, 207 U.S. 564 (1908). This is especially true in light of the federal government's additional duty to press competing federal reserved water rights claims in the same proceeding. As *Nevada v. United States*, *supra*, demonstrates, the "conflict of purposes" faced by the United States because of its duty to advance competing federal reserved water rights claims places a great deal of responsibility on the Indian tribe whose water rights are at stake to ensure that the federal government does not undervalue its claims. *Id.*, 463 U.S. at 137 n.15. Simply put, history has taught that it is the Indian tribes themselves, through a combination of candidness and cooperation, who must ensure the adequacy of the federal government's representation of them in the water rights area.[2] The stakes are high; failure will mean the loss of federal water rights, a property right precious to Indian tribes, forever.

As a practical matter, Indian tribes play an integral, if not predominant, role in the development of the federal reserved water rights claims that the federal government is required to advance on their behalf for two other reasons. First, no one possesses a more intimate knowledge of a geographical area's land and water resources than the Indian people who have occupied the area since time immemorial. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984) ("The Klamath Indians have hunted, fished, and foraged in the area of the Klamath Marsh and upper Williamson River for over a thousand years."). The historical knowledge that the Lummi Nation possesses of its salmon fishery and that the Zuni Indian Tribe possesses of its agricultural and religious use of the Zuni Heaven portion of its reservation, for example, is unique and proprietary. That knowledge has been absolutely vital to the proper development of those Tribes' respective claims for water: in the Lummi Nation's case, in a reservation groundwater adjudication; for the Zuni Indian Tribe, in the Little Colorado River general stream adjudication.

[2]Once decreed, an Indian tribe is bound by the quantification of its water rights. This is true even if the tribe later can prove that the United States violated its trust responsibility. In such a case, an Indian tribe's only remedy is against the United States for money damages in a breach of trust action. *See Nevada*, 463 U.S. at 144 n.16; *id.* at 135 n.14. From the perspective of an Indian tribe, the best possible outcome of a general stream adjudication quantifying its water rights is a final decree awarding it all the water to which it is entitled under prevailing law, not some lesser amount of water and a colorable breach of trust claim against the federal government. Success in a breach of trust action is never a substitute for water forever lost.

In developing water claims, Indian tribes typically supplement their historical knowledge with hydrologic and economic development studies.[3] Such studies tend to be expensive and time consuming. The federal government requires that an Indian tribe share both types of information before it will press a water rights claim on behalf of a tribe. For the federal government to obtain such information independently would be costly and needlessly duplicative; in the case of historical and economic data, where an Indian tribe may be the sole source of such information, it may be impossible.

Second, that an Indian tribe tends to take the lead in developing the water rights claim the federal government ultimately will advance on its behalf makes further sense when one considers the number of such cases in which the United States is obligated to represent tribal interests. *See* Pet. for Writ of Cert. at 27. *See also* 25 U.S.C.A. § 175 (1983). With its resources dispersed among such a multitude of cases, the federal government simply cannot be expected to develop on its own the detailed body of knowledge necessary for proper litigation of an Indian water rights claim, especially when compared with the wealth of information in the possession of an Indian tribe whose focus is concentrated on its own claim.[4] In fact, the federal government historically has relied heavily upon Indian tribes not only for factual documentation to support their water rights claims, but also for their legal analyses and theories regarding the scope of those claims. In short, Indian tribes are chiefly responsible for developing and shaping their water rights claims, even though the federal government is required to submit the claims for the tribes' benefit. Without an Indian tribe's contribution of factual information and legal analysis, the United States would be handicapped in its ability to represent the tribe's interests in the manner that the high fiduciary standards of the trustee's role requires, and the tribe's interests would be severely jeopardized.

The majority decision of the court of appeals penalizes the Klamath Indian Tribes for cooperating with the federal government (at the government's request) to ensure proper execution of the trust responsibility. The court of appeals correctly observed that Indian tribes have a direct interest in their natural resources and thus in the subject matter of the consultations at issue here. The court erred when it relied upon this interest

[3]For example, a tribe's municipal, domestic, industrial, and commercial claims depend largely on its plans for future economic development. Such plans, which are confidential, contain information that is absolutely vital to the proper development of a tribe's water rights claims.

[4]Because of the requirement that it adjudicate all competing federal reserved water rights claims in the general stream adjudication to which they are relevant, the federal government's resources are further diluted within the case itself, where the tribal interest is but one of the many the United States is obliged to represent.

as the basis for ordering the Department to disclose privileged documents provided by the Tribes to assist the United States fulfill its trust obligations, rather than focusing on the function of the documents within the Department's deliberative process.

It cannot be stressed enough that this Court's decision in *Nevada v. United States*, *supra*, instructs Indian tribes that the water rights claims advanced on their behalf by the United States in a general stream adjudication must include the entire quantity of water to which the tribes believe themselves forever entitled under the law; any claim not so advanced and not ultimately made part of the final decree in the proceeding will forever be lost. *Id.*, 463 U.S. at 135. In light of this clear directive, as well as the fact that the very nature of the trustee-beneficiary relationship compels cooperation on the part of Indian tribes and the federal government, the appeals court's conclusion that the tribes' "direct interest" requires public disclosure is fundamentally flawed. The practical effect of the court of appeals' decision is to drain the trust relationship of all its vitality.

CONCLUSION

As evidenced by the divided decision of the Ninth Circuit below, this case raises a question of exceptional importance concerning the continuing viability of government-to-government relations between the United States and Indian tribes under their historic trust relationship, long recognized as "one of the primary cornerstones of Indian law." F. Cohen, *Handbook of Federal Indian Law* 221 (1982 ed.). Because Indian tribes *always* have a direct interest in the natural resources held in trust for them by the United States, the court of appeals' decision effectively endorses the use of the FOIA as a tool to circumvent the necessarily confidential communications between tribes and the federal government concerning trust resources. Because the court of appeals' decision is at odds with the longstanding precedent of this Court construing the trust relationship, the decision should not be permitted to take effect without plenary review by this Court.

For all of the foregoing reasons, the United States' Petition for a Writ of Certiorari should be granted.

Dated: Albuquerque, New Mexico
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Respectfully submitted,

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